BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TED A. LANGDON Claimant VS. **C.J. FOODS, INC.** Respondent AND **UNITED WISCONSIN INSURANCE CO.** Insurance Carrier	)	Docket No. 1,071,116

ORDER

STATEMENT OF THE CASE

Claimant requested review of the October 28, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. Bryce D. Benedict of Topeka, Kansas, appeared for claimant. Wade A. Dorothy of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant failed to prove personal injury by accident arising out of and in the course of his employment with respondent on July 31, 2014.[1] The ALJ determined claimant's right shoulder injury is, at most, an aggravation of a preexisting condition and denied claimant's request for medical treatment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 28, 2014, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

[1] The parties agreed, for preliminary hearing purposes, to an accident date of July 31, 2014, based upon the understanding this was the date a physician told claimant his condition may be due to repetitive work. An Application for Hearing filed September 10, 2014, lists a repetitive trauma up to September 5, 2014, and continuing.

ISSUES

Claimant argues no evidence was presented to prove his right shoulder injury preexisted his employment with respondent. Claimant contends medical testimony is not required to establish personal injury by accident or prevailing factor. Claimant argues the ALJ erred in finding his claim non-compensable.

Respondent maintains the ALJ's Order should be affirmed in all respects. Respondent argues that due to the lack of credible evidence, including professional medical evidence, claimant failed to meet his burden of proving personal injury by accident arising out of and in the course of his employment.

The issue for the Board's review is: Did the ALJ err in finding claimant's alleged injury by repetitive trauma non-compensable?

FINDINGS OF FACT

Claimant began his employment with respondent in April 2011 as an extruder operator. This position is considered a Level 4 job, meaning the worker applies force of 50 to100 pounds occasionally, 25 to 50 pounds frequently, and 10 to 20 pounds constantly. Respondent required a pre-employment physical upon application for this position, and claimant attained a result of Level 4.73. Claimant testified approximately 75 percent of his workday is spent lifting, moving, or dumping items ranging from approximately 50 to 200 pounds. Clalimant stated he constantly uses his arms at work, especially his right arm.

Claimant testified he had no problems with his right shoulder prior to his employment with respondent. Claimant stated he began to notice a burning, uncomfortable pain in his right shoulder, similar to a pulled muscle, while dumping scrap barrels sometime in May 2014. Claimant testified:

> . . . it was uncomfortable, but everything's going so fast there that you just get the job done. And I just – in a few days it didn't bother you anymore. I mean, you know, you just kind of babied it and used your left arm a lot more.[2]

Sometime around July 1, 2014, claimant "really felt it" when he lifted the scrap barrels.[3] He described a burning or stinging sensation in his right shoulder every time he lifted. Claimant stated his right shoulder pain worsened over time and began to make a

[2] P.H. Trans. at 12-13.

[3] *Id*. at 13.

"crunching noise" and lock up when raising his arm to shoulder-height.[4] Claimant went to Dr. Kevin Kennally on July 21, 2014, for evaluation of his right arm.

Dr. Kennally's progress note dated July 21, 2014, indicates claimant complained of bilateral shoulder pain. Dr. Kennally wrote, "He says he has talked to me about this before."[5] Claimant testified he had some left shoulder pain in the past, but never discussed right shoulder pain with Dr. Kennally until July 2014. Dr. Kennally suspected a rotator cuff tear or tendonitis and ordered x-rays and an MRI.

The MRI, taken on July 23, 2014, revealed a large full-thickness tear of the distal supraspinatus tendon. The interpreting physician noted claimant appeared "to be a risk for complete tear of the supraspinatus and infraspinatus tendons."[6] Following the MRI results, Dr. Kennally referred claimant to Dr. Michael McCoy, an orthopedic surgeon. Claimant testified he informed respondent of the need to see a surgeon prior to his visit with Dr. McCoy.

Dr. McCoy examined claimant on July 31, 2014, finding claimant required surgical intervention to repair the supraspinatus tendon tear of the right shoulder. Claimant's surgery was later cancelled due to the length of time required to obtain authorization through workers compensation. In a letter dated September 2, 2014, Dr. McCoy wrote:

> It is my medical opinion that [claimant's] right shoulder rotator cuff tear cannot be tied to a specific date of injury, since none has been stated in any medical office visit by the patient. The MRI indicated a full-thickness tear of the supraspinatus tendon. While I am sure this injury is aggravated by his work, and is causing significant discomfort/pain, the diagnosis of a rotator cuff tear does not necessarily specify a traumatic injury.[7]

Claimant testified respondent modified his duties after receiving notice of his injury, although neither Dr. Kennally nor Dr. McCoy provided any work restrictions or limitations. Claimant continues to work at respondent.

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[4] *Id*. at 15.

[5] *Id*., Cl. Ex. 3 at 1.

[6] *Id*. at 6.

[7] P.H. Trans., Resp. Ex. A at 1.

PRINCIPLES OF LAW

K.S.A. 2014 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2014 Supp. 44-508(d) states, in part:

"Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2014 Supp. 44-508(f) states, in part:

(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
>
> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
>
> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

K.S.A. 2014 Supp. 44-508(g) states, in part:

> "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.

ANALYSIS

Claimant has alleged an injury by repetitive trauma arising out of his employment with respondent. The ALJ denied this claim primarily based upon Dr. McCoy's statement that claimant's "right shoulder rotator cuff cannot be tied to a specific date of injury."[8] The ALJ found claimant's right shoulder injury to be an aggravation of a preexisting condition. The undersigned Board Member disagrees.

Claimant's testimony of heavy repetitive work and a progressive worsening of symptoms in his shoulders related to his job duties, beginning nearly three years after claimant began working for respondent, is consistent with an injury by repetitive trauma. Dr. McCoy's statement that claimant's injury was aggravated by his work is consistent with the process of an injury by repetitive trauma.

Dr. McCoy's statement would carry more weight if there was evidence of a preexisting rotator cuff tear. However, there is no such evidence in the record. Claimant denied preexisting problems with his shoulders in the Physical Capacity Profile[9] completed prior to his employment with respondent. There is no comment related to a prior shoulder problem in the Physical Capacity Profile summary.[10] Claimant achieved a total score of 4.73 on the Physical Capacity Profile, indicating he was capable of working in the heavy to very heavy work categories.[11] Claimant is now working in an accommodated position with respondent.

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[8] P.H. Trans., Resp. Ex. A at 1.

[9] P.H. Trans., Cl. Ex. 2 at 6.

[10] *Id.* at 2.

[11] *Id.* at 1.

Respondent argues that there is no expert medical evidence that says claimant's repetitive trauma is the prevailing factor causing claimant's injury and need for medical treatment. K.S.A. 2014 Supp. 44-508(g) does not require an expert medical opinion to prove prevailing factor.[12] It requires a determination of the primary factor, based upon consideration all relevant evidence. Claimant's repetitive lifting activities working for respondent exposed him to an increased risk of injury that he would not have been exposed to outside of work. The prevailing factor causing claimant's injury and need for medical treatment, considering all relevant evidence submitted by the parties, was his heavy repetitive work for respondent.

CONCLUSION

Claimant has proven that he suffered an injury from repetitive trauma arising out of and in the course of his employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Rebecca A. Sanders dated October 28, 2014, is reversed.

Respondent is ordered to provide medical treatment for claimant's shoulders with Michael T. McCoy, M.D., and his referrals. Respondent is ordered to pay medical bills related to treatment for claimant's shoulder incurred after September 5, 2014.

IT IS SO ORDERED.

Dated this _____ day of December, 2014.

_____
HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: Bryce D. Benedict, Attorney for Claimant
bryce.benedict@eschmannpringle.com

Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
wade@thedorothylawfirm.com

Rebecca A. Sanders, Administrative Law Judge

[12] See *Wright v. Gear for Sports*, No. 1,058,254, 2012 WL 2890471 (Kan. WCAB June 8, 2012)